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No.

In The

Supreme Court of the United States

OCTOBER TERM, 1984

JAMES BULLETT, ADMINISTRATOR OF
THE ESTATE OF KENNETH BULLETT, *ET AL.*
Petitioners,

V.

UNITED TECHNOLOGIES CORPORATION
REPRESENTED EMPLOYEE RETIREMENT PLAN,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPECTFULLY SUBMITTED

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QUESTIONS PRESENTED

1. Whether the Respondent Plan wrongfully withheld pension benefits from Petitioner Mrs. Bullett as contingent annuitant when its alter ego, the employer, to its unjust enrichment, breached its pension contract with its employee-annuitant by wrongfully causing his on-the-job death and thereby preventing his attaining age 55 in fulfillment of his pension contract obligations.

2. Whether the granting of a summary judgment was erroneous in this case of first impression presenting novel questions of law and complex issues of social policy and legislative interpretation, particularly in light of numerous unresolved crucial questions of fact.

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Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners, James Bullett, Administrator of the Estate of Kenneth J. Bullett, *et al.*, respectfully pray that a writ of certiorari issue to review the unreported judgment of the United States Court of Appeals for the Second Circuit entered October 18, 1983.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit was rendered on October 18, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

OPINIONS AND RULINGS BELOW

On November 24, 1982, United States Magistrate Thomas P. Smith ruled that summary judgment should enter in favor of the Defendant United Technologies Corporation Represented Employee Retirement Plan. On December 17, 1982, T.F. Gilroy Daly, J. reversed the Magistrate's decision. Upon motion for reconsideration, the Court, Daly, J., vacated its prior ruling and adopted and affirmed the Magistrate's ruling in its entirety. On April 6, 1983, judgment entered for the defendant. On October 18, 1983, the United States Court of Appeals for the Second Circuit, Kaufman, Newman, Davis, JJ., affirmed the judgment of the District Court. All of the foregoing unreported opinions and rulings are reproduced in the appendix.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. §1104 (a)(1)(D)

§1104 Fiduciary duties

(a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

... (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter of subchapter III of this chapter.

29 U.S.C. §1141

Coercive interference

It shall be unlawful for any person through the use of fraud, force, violence, or threat of the use of force or violence, to restrain, coerce, intimidate, or attempt to restrain, coerce, or intimidate any participant or beneficiary for the purpose of interfering with or preventing the exercise of any right to which he is or may become entitled under the plan ...

STATEMENT OF THE CASE

Plaintiffs' decedent, Kenneth J. Bullett, had been employed by Sikorsky Aircraft Company, a subsidiary of United Technologies Corporation, ("the Company") for more than 27 years and was a fully vested participant in its Represented Employee Retirement Plan ("the Plan"). Under the terms of the Plan, he or his contingent annuitant would be eligible for benefits as soon as he reached the age of 55.

On March 10, 1981, two days before his 55th birthday, Kenneth Bullett was killed at the Company's plant as a direct result of an on-the-job safety failure. Mr. Bullett sustained his fatal injuries operating a tow motor in the course of his employment. When he backed out of a truck onto which he had driven in order to load some parts, some plates connecting the truck to a platform gave way. The tow motor fell into the resulting gap and Mr. Bullett was crushed against the steering wheel of his vehicle and died instantly. Contrary to industry-wide practice, the tow motor did not have a rollbar to protect an operator from direct bodily impact in the event of a tip-over.

A few weeks before his death, Kenneth J. Bullett had designated his retirement funds to be paid as a 100% contingent annuity to his wife, Phyllis Bullett. However, the Respondent refused to pay Mrs. Bullett the pension benefits after her husband was killed, claiming that Kenneth Bullett, by dying before age 55, had not satisfied the eligibility requirements of the Plan. The instant law suit followed.

Jurisdiction was appropriate in the federal courts below because this case presented a question of interpretaion of federal law.

ARGUMENT

REASONS FOR GRANTING THE PETITION

The Petitioners, James Bullett, *et al.*, respectfully submit that the United States Court of Appeals for the Second Circuit has incorrectly decided a case of first impression concerning federal pension law (ERISA). Petitioners have found no prior case law addressing this particular fact pattern, nor is employer-caused death discussed in the legislative history of ERISA. However, due to the equitable considerations and

public policy behind ERISA, the decisions below were erroneous in finding irrelevant the employer's culpability in bringing about the employee's death before his vested pension benefits became payable to his contingent annuitant. The Magistrate's decision, which was adopted by the District Court and affirmed by the Court of Appeals, inappropriately relied upon case law dealing with the situation where the primary annuitant had died of natural or at least non-employment related causes. Those fact patterns are clearly distinguishable from the instant case where the worker died on the job as the result of an eggregious industrial safety violation by the employer.

The essence of the decisions below is that since the employee did not perform his obligation under the pension contract to attain age 55, the Plan is excused from its duty to pay the contingent annuity. This classic contract doctrine, however, is inapposite to the instant case. The courts below erred in failing to consider the compelling and more appropriate contract principle that by preventing the employee from performing, the employer itself was in breach.

Petitioners argued below that the employer's culpability should be attributed to the Plan. By their silence on that issue, both lower courts necessarily disagreed and adopted Respondent's view that the Plan should be insulated from the employer's culpability. Thus, these decisions, while purporting to uphold ERISA, in fact undermine it. Under this rationale an employer could with impunity do anything it wished to prevent an employee from receiving pension benefits knowing that the pension plan would itself be insulated from its wrongdoing. For example, an employer could fire an employee shortly before full eligibility occurred. Relying on the rule advanced by the courts below, the company's pension plan could then refuse to pay the employee's benefits on the theory that it, as a separate entity from the employer, is not allowed to consider the employer's conduct but must only determine whether the employee has met all of the plan's requirements. The very purpose of ERISA was to prevent this situation from happening. This Court should therefore review this serious erosion of the policies and purposes of ERISA brought about by the decisions below.

I. THE RESPONDENT PLAN WRONGFULLY WITHHELD PENSION BENEFITS FROM PETITIONER MRS. BULLETT AS CONTINGENT ANNUITANT WHEN ITS ALTER EGO, THE EMPLOYER, TO ITS UNJUST ENRICHMENT, BREACHED ITS PENSION CONTRACT WITH ITS EMPLOYEE-ANNUITANT BY WRONGFULLY CAUSING HIS ON-THE-JOB DEATH AND THEREBY PREVENTING HIS ATTAINING AGE 55 IN FULFILLMENT OF HIS PENSION CONTRACT OBLIGATIONS.

There is no dispute that pension rights are contractual in nature. *Turner v. Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 604 F.2d 1219 (9th Cir. 1979). However, it is crucial to determine who the parties to the contract are in order to decide any questions regarding possible non-fulfillment of any contractural terms. It is clear that in the instant case the contract existed between the employer and the employee. The employee was to render long time service and live until at least age 55, in exchange for which he or his contingent annuitant could receive pension benefits after his 55th birthday.

The essence of the Magistrate's decision below is that Kenneth J. Bullett failed to perform his obligations under his pension contract with the Company by not living to age 55. By echoing the Respondent's "a contract is a contract" argument, the Magistrate concluded that Section 7.1 of the Plan precludes payment of a contingent annuity to Mr. Bullett's designated contingent annuitant. However, the Magistrate refused to consider the importance of any contractual breach on the part of the Company. While such denial of benefits might be appropriate where the employee dies of non-work related causes, Petitioners fail to understand how a court charged with construing the equitable and remedial ERISA legislation can hold that the employer's responsibility in causing the annuitant's death is not relevant as a matter of law.

The decisions below uniformly fail to consider an important corollary to the "contract is a contract" theory which controls this case. It is hornbook law that a party who prevents the performance of the other is himself liable for breach of contract. *See*, Laurence P. Simpson, *Contracts*, §190; *Restatement of Contracts*, §315. Connecticut has long subscribed to this rule. "Certainly a defendant who has wrongfully prevented the other party from completing performance cannot set up the nonper-

formance of the other party as a defense." *Burns v. Gould*, 172 Conn. 210, 221 (1977), citing *Connelly v. Devoe*, 37 Conn. 570 (1871).

In another contract dispute, the Connecticut Supreme Court stated: "where a party stipulates that another shall do a certain thing, he thereby impliedly promises that he will himself do nothing which will hinder or obstruct that other in doing that thing . . .[.]" *Godburn v. Meserve*, 130 Conn. 723, 726 (1944) (citations omitted). The court further explained that the test for wrongful hinderance is "was it or was it not conduct which must be said to have been fairly within the contemplation of the parties when the agreement was entered into?" *Id.* at 727 (citations omitted). By failing to provide proper safety equipment, United Technologies breached its implied promise not to do anything to prevent Kenneth J. Bullett from reaching the age where his retirement benefits would ripen. Moreover, it can be said with considerable assurance that the employer's conduct of providing unreasonably and fatally dangerous equipment was not in the contemplation of the parties, and certainly not in Mr. Bullett's contemplation, at the time the pension agreement was made. Thus, the "contract is a contract" argument should not be used to prevent Mrs. Bullett from collecting the pension to which she is entitled.

Because of the employer's responsibility in bringing about the situation which caused Mr. Bullett's death, the instant case is distinguishable from the line of cases which did not put the employer's conduct in issue and upon which the decisions below rely. *See, e.g. Hernandez v. Southern Nevada Culinary & Bartenders Pension Trust*, 662 F.2d 617 (9th Cir. 1981). *Pompano v. Michael Schiavone & Sons, Inc.*, 680 F.2d 911, 914 (2d Cir. 1982), *cert. denied*, — U.S. —, 1035 S. Ct. 454 (1982), the case relied upon by the Court of Appeals for the proposition that trustees are not authorized to pay benefits not in accord with the terms of the Plan or ERISA, is entirely inapposite to the instant case. In *Pompano* the issue was whether the insured had a right to a lump sum payment of his pension benefits when the plan did not give that right automatically. There was no claim in *Pompano*, as there is in the instant case, that the trustees were wrongfully withholding pension benefits altogether. Moreover, there was no question in *Pompano* of any wrongdoing on the part of the employer in preventing the employee from collecting his pension benefits. Therefore, *Pompano* is not convincing authority in this case.

In light of the tortious and contractual misconduct of the employer, the

only explanation of the holdings below is that the courts accepted the Respondent Plan's argument that it and the employer are separate entities. Since the Plan and its trustees did not bring about the conditions leading to Mr. Bullett's untimely death, the Plan was seen as immune from liability for any culpable conduct of the employer. The Plan was held to be serving a primarily ministerial and fiduciary role and was thus powerless to consider the reasons behind the employee's failure to fulfill eligibility requirements.

However, an acceptance of this theory would in effect repeal ERISA since any employer-created and funded pension plan could blithely ignore the company's misconduct and thereby circumvent ERISA. This situation would be particularly profitable to those companies with fixed benefit plans. The more employees it could eliminate from collecting pension benefits, the more the employer would gain financially through reduced required contributions to the pension fund. This approach, of course, directly violates 29 U.S.C. §1141 of ERISA which prohibits any person from interfering with an employee's exercise of pension rights. However, the holdings below sanction this result by totally segregating a pension plan from the company it serves and thereby leading to the possible unjust enrichment of the employer.

In the instant case, the Respondent Plan's Administration Committee is composed entirely of high level managers and corporate officers. Thus the potential for self dealing is extremely high. Even when the interlocking character of the employer and the plan trustees was not placed in issue, at least one court saw fit to impute the conduct of the employer to the plan. *See, e.g., Seafarers Pension Plan v. Sturgis,* 630 F.2d 218 (4th Cir. 1980). In *Seafarers,* the plaintiff employee brought an action against the plan itself, not the employer, for withholding pension benefits because of an involuntary break in service. The court held that where the break in service is involuntary and is caused by the conditions of the industry or the unavailability of work, the break in service rule is invalid and the trustees of a pension plan act arbitrarily and capriciously when they deny benefits in such a case. *Id* at 222. The "industry" in that case clearly subsumed the employer. Therefore, the court in its holding necessarily looked at the employer's conduct and imputed it to the plan. By the same token, the employer's conduct in the instant case must be imputed to the Plan. To do otherwise would dangerously insulate a plan from whatever conduct, benign or eggregious, direct or indirect, an employer might take to prevent

an employee from claiming his pension benefits.

The Respondent's self dealing as a result of the exclusive management composition of the Plan Administration Committee brought about an unjust enrichment for the employer. The Plan is a defined benefit plan whereby the benefits to the employees are fixed by agreement and the employer must make contributions in amounts necessary to meet the benefit payments due. The employer's contribution, therefore, must vary according to the level of commitments outstanding at any given time. Section 9.2 of the Plan provides that "[f]orfeitures and actuarial gains arising from actual experience under the Plan shall be used to **reduce further Employer Contributions** under the Plan and **will not be used to increase any benefits payable under the Plan.**" (emphasis supplied). Thus, when an otherwise vested employee is killed due to the negligence of the employer, under the self-serving construction given by the trustees in this case, the Company realizes a benefit since its contributions to the Plan are thereby reduced by the actuarial amount of the dead worker's accrued benefits. The employer is thus allowed to economically profit from his own wrong **and** the entire transaction is sanctioned by the high level agents of the employer wearing sanctified fiduciary hats.

Again, in contract terms, this is a clear case of unjust enrichment for the employer who profits from a death for which he was strictly liable under state Workers Compensation law. *Jett v. Dunlap*, 179 Conn. 215, 217 (1979). The employer's profit in this case is measured by a reduced employer contribution to the Plan and by the 27 years of "free" service given to the Company by Kenneth J. Bullett. In *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. denied* 336 U.S. 960 (1949), the United States Court of Appeals for the Seventh Circuit held that an employee's services were given in consideration for his pension interest. Thus, Mr. Bullett gave full consideration for his pension interest, while the Company, which precluded him from living long enough to have those pension rights paid, is seeking to withhold its end of the bargain, all to its own unjust enrichment.

It should be noted moreover that strict reliance on the language of the Plan itself supports Petitioners' position at least as well as it does Respondent's claims. Section 7.1 of the Plan authorizes payment of an annuity to the designated contingent annuitant of an employee who dies at age 55 or later. The Plan is silent regarding the specific situation where a

fully vested employee, such as Kenneth J. Bullett, is killed before age 55 in the course of his employment as a result of his employer's failure to provide adequate safety measures.

The terms of the Plan, however, do not begin and end with section 7.1. No extensive citations are required to state that contract terms must be read *in pari materia*. Section 10.5 of the plan provides that the Administration Committee shall have not only the power but also the *duty* "[t]o interpret the plan and to decide any and all matters arising [t]hereunder, including the right to remedy possible ambiguities, inconsistencies or omissions . . .[.]" The Administration Committee could have invoked §10.5 to indicate that the drafters of the Plan did not contemplate employer caused on-the-job deaths. The Plan Administration Committee thus could have addressed the unfortunate situation presented here of an employee dying at the employer's hands by exercising its rights and duties under §10.5 to remedy the situation. By so doing, the committee would have discharged its duties in accordance with the Plan terms since §10.5 is one of the Plan terms and would not therefore have run afoul of 29 U.S.C. §1104 (a)(1)(D)(1976) which requires trustees to discharge their duties according to plan terms. Furthermore, it then would have considered the conduct of both employer and employee, the two actual parties to the pension contract, in determining which party did or did not fulfill its obligations under that contract. However, by refusing to act under the authority of §10.5 of the Plan, the trustees necessarily suggest that there is no omission in the Plan. It logically follows that if there is no omission, the drafters necessarily factored into the actuarial assumptions of the pension scheme some number of employer caused deaths to reduce employer contributions. Such a callous equation surely offends public policy and clearly should not be sanctioned by ERISA which was enacted to protect employees' pension rights and not to act as a shield for insidious employer misconduct and self-dealings.

Finally, by arbitrarily deciding that the employee did not fulfill his obligations while completely disregarding the employer's misconduct, the Plan's Trustees have themselves shown that they are not impartial and unbiased fiduciaries as required by ERISA. By their very actions, they eloquently prove the Petitioners' argument that the Plan is indeed the alter ego of the employer.

II. THE GRANTING OF SUMMARY JUDGMENT WAS ERRONEOUS IN THIS CASE OF FIRST IMPRESSION PRESENTING NOVEL QUESTIONS OF LAW AND COMPLEX ISSUES OF SOCIAL POLICY AND LEGISLATIVE INTERPRETATION, PARTICULARLY IN LIGHT OF NUMEROUS UNRESOLVED CRUCIAL QUESTIONS OF FACT.

For the reasons stated above, the extent of the employer's culpability is relevant to the determination of this case. United Technologies may be culpable in this case under numerous theories. Under the Connecticut Workers Compensation Act, Conn. Gen. Stat. Section 31-275 *et seq.*, the employer is held strictly liable for job related injuries. "The purpose of the workers' compensation statute is to compensate the worker for injuries arising out of and in the course of employment, without regard to fault, by *imposing a form of strict* liability on the employer". *Jett v. Dunlap*, 179 Conn. 215, 217 (1979), citing *Klapproth v. Turner*, 156 Conn. 276, 279 (1968) (emphasis supplied). If the employer is strictly liable without any fault on his part, then *a fortiari*, its culpability is far more pronounced when, as in the instant case, it is directly responsible for the death of its employee through either misfeasance or nonfeasance. In any event, under Connecticut law, United Technologies is clearly liable for Mr. Bullett's death.

Moreover, discovery and trial might even show that the employer's conduct was willful and not merely negligent and that such willfulness prevented Mr. Bullett from living to age 55, in direct violation of ERISA which prohibits coercive interference with an employee's pension rights. 29 U.S.C. §1141. Several courts have held that an employee states a cause of action for an intentional tort when the employer's activity amounts to an eggregious disregard of safety standards. *Blankenship v. Cincinnati Milacron Chemicals, Inc.*, 69 Ohio St. 2d 6081, 433 N.E. 2d 572 (1982); *Mandolidis v. Elkins Industries, Inc.*, 246 S.E. 2d 907 (W. Va. 1978); *Wisner v. Radnor Manufacturing, Inc.*, 8 C.L.T. No. 511 at 17 (Conn. Super. Ct. Dec. 20, 1982). [Continuous neglect by employer to correct safety violations raises its negligence to the level of intentional misconduct.] Factual determination is needed in this case to decide whether the lack of a rollbar on Mr. Bullett's tow motor, in violation of industry-wide safety precautions, was so grossly negligent as to rise to the level of willful misconduct in the form of an intentional tort. Willful conduct would of course fall within the parameters of 29 U.S.C. §1141. Such a factual

determination cannot be made in a motion for summary judgment and requires a trial.

Summary judgment is particularly inappropriate in this case of first impression. Courts have been reluctant to grant summary judgment in cases of first impression that involve significant social questions, *Hospital Association of New York State, Inc. v. Toia*, 438 F. Supp. 866 (S.D.N.Y. 1977); in lawsuits that raise novel questions of law, *New York Stock Exchange v. Sloan*, 394 F. Supp, 1303 (S.D.N.Y. 1975); or, in test cases, *Columbia Broadcasting Systems, Inc. v. Teleprompter Corp.*, 251 F. Supp. 302, 305 (S.D.N.Y. 1965). The instant case clearly meets all of these requirements.

Petitioners were criticized by the Court of Appeals for not seeking discovery regarding consistent enforcement of Section 10.5 of the Plan. However, "[d]ismissal of a complaint is a drastic step. It is a device that must not be employed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Wade v. Johnson Controls, Inc.*, 693 F.2d 1922 (1982). Since there is no indication that Petitioners would have been unable to prove any facts to support their claim, failure to seek discovery should not have been fatal for Petitioners in this case.

CONCLUSION

For the reasons stated above, this Court should issue a writ of certiorari in this case to review the questions presented herein.

RESPECTFULLY SUBMITTED

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CERTIFICATION

This is to certify that three (3) copies of the foregoing Petition for Writ of Certiorari were mailed, postage prepaid, on this 13th day of January 1984 to Attorneys Felix Springer and Daniel FitzMaurice, Day, Berry & Howard, One Constitution Plaza, Hartford, Connecticut, and Attorney Lawrence A. Cavanaugh, United Technologies, United Technologies Building, Hartford, Connecticut.

SALVATORE C. DePIANO

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THE ESTATE OF KENNETH BULLETT, *ET AL.*
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UNITED TECHNOLOGIES CORPORATION
REPRESENTED EMPLOYEE RETIREMENT PLAN,
Respondent

PETITIONERS' APPENDIX

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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JAMES BULLETT, ADMINISTRATOR
of the Estate of Kenneth J. Bullett, and
PHYLLIS BULLETT,

Plaintiffs

V. CIVIL NO. B-82-415
(TFGD)

UNITED TECHNOLOGIES CORPORATION REPRESENTED EMPLOYEE RETIREMENT PLAN,

Defendant

RULING ON MOTION

FOR SUMMARY JUDGMENT

This removed action arises under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 *et seq.*, and results from the death of Kenneth J. Bullett in an industrial accident at the Sikorsky Aircraft Company ("Sikorsky") on March 10, 1981, two days before his 55th birthday. Sikorsky is a subsidiary of the United Technologies Corporation ("UTC"). At the time of his death Bullett had worked for Sikorsky for over 27 years and was a participant in UTC's Represented Employees Retirement Plan ("the Plan"), an employee pension benefit plan governed by ERISA. (Palasek Affidavit paragraphs 5, 6).

Prior to his death, Kenneth Bullett had elected that his retirement annuity be paid in the form of a 100% contingent annuity. He further designated his spouse, Phyllis Bullett, as the contingent annuitant, to receive the retirement annuity, if any, that otherwise would be payable to him. (Palasek Affidavit paragraphs 5(b)(c)). After her husband's death, Mrs. Bullett applied for death benefts under the Plan, but her application was denied on grounds that Kenneth Bullett had died before reaching the age of 55. Thereafter, this action was commenced in Superior Court. The

defendant properly removed the action to this court and has moved for summary judgment. The motion must be granted.

Section 7.1 of the Plan provides:

> "*Death While Employed by the Employer. If a Participant dies while employed by the Employer and the Affiliates on or after the date on which he has attained age 55* and has completed at least 10 years of Continuous Service, *his Contingent Annuitant*, if any, designated in accordance with Section 7.4, *shall receive*, commencing as of the first day of the month following the Participant's death and ending with the payment preceding the Contingent Annuitant's death, *monthly payments in an amount equal to the Contingent Annuity that would have been payable monthly to the Participant if the Participant had retired as of the day of his death* after designating that his Retirement Annuity be paid in the form of a 100% Contingent Annuity; provided, that if the Participant has specified, in accordance with Section 7.4, that his Contingent Annuitant shall receive a lesser portion of his monthly reduced Contingent Annuity, the benefit payable monthly under this Section 7.1 shall be equal to such lesser portion; further provided, that if the Participant dies while employed by the Employer and the Affiliates on or after attaining his Normal Retirement Age, unless another Contingent Annuitant designation under Sections 7.4 is effective on the date of his death, his Spouse (if any) shall be his Contingent Annuitant for purposes of this Section 7.1."

(Emphasis added). Section 5.5 of the Plan provides that "early retirement" may occur only "after attaining age 55 and completing at least ten years of Continuous Service." There is no dispute that Kenneth Bullett had not attained age 55 at the time of his death.

Since Mr. Bullett died before attaining the age of 55, his contingent beneficiary is not entitled to benefits under the Plan. Although plaintiffs' counsel has done a thoroughly commendable job attempting to distinguish this case from similar ones in which benefits have been denied,

Hernandez v. Southern Nevada Culinary & Bartenders Pension Trust, 662 F.2d 617 (9th Cir. 1981), requires that defendant's motion be granted. In that case the plaintiff brought an action to recover benefits as the beneficiary of her husband, who had died roughly three months before reaching the minimum retirement age as defined in the plan in which he had participated. In affirming the district court's entry of summary judgment in defendant's favor, the *Hernandez* Court remarked as follows:

> "In claiming the she is entitled to receive her deceased husband's benefits as his beneficiary, even though he never attained 'normal retirement age,' appellant implicitly argues that Hernandez had a right to receive his accrued retirement benefits at anytime after he satisfied the 10-year service requirement and before he reached 62, the normal retirement age. However, ERISA gives an employee-participant no vested right to receive pension benefits until he reaches normal retirement age. §1053(a); *Hurn v. Retirement Fund Trust of Plumbing, etc.*, 648 F.2d 1252, 1253-54 (9th Cir. 1981); *Spitzler v. New York Post Corp.*, 476 F. Supp. 386, 389-90 (S.D.N.Y. 1979), *aff'd*, 620 F.2d 19 (2nd Cir. 1980); *Riley v. MEBA Pension Trust*, 452 F. Supp. 117, 120 (S.D.N.Y. 1978), *aff'd*, 586 F.2d 968 (2nd Cir. 1978); *see Capocci v. General Motors Corp.*, 444 F. Supp. 1306, 1307-08 (D. Haw. 1978). Moreover, other provisions of ERISA and its legislative history indicate that Congress never intended to impose upon a plan a requirement that any benefits be payable before age 65. *Riley v. MEBA Pension Trust, supra*, 452 F. Supp. at 120; *see* §1056(a); H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., *reprinted* in 3 [1974] U.S. Code Cong. & Ad. News 5038, 5062. Accordingly, we hold that ERISA's minimum vesting provisions require only that, once an employee-participant satisfies his pension plan's length of service requirement, his right to receive his vested pension benefits mature on his reaching the normal retirement age contained in the plan."

Hernandez, supra, 662 F.2d at 619-620.

A similar issue was disposed of unfavorably to the plaintiff in *Wyzik v.*

Employee Benefit Plan of Crane Co., 512 F. Supp. 1222 (D. Mass. 1981). In that case plaintiff's husband, who had been employed for 34 years, died shortly before his 62nd birthday. The district court granted the defendant plan's motion to dismiss observing, in part, as follows:

> The precise question raised in this case could have been resolved by an amendment to H.R. 2 offered by Rep. Holtzman (D.N.Y.) on February 28, 1974. 120 Cong. Rec. 4723 (1974). That amendment would have ensured the availability of pension benefits (including survivor's benefits) from and after 'the earliest age at which [the employee] acquired any non-forfeitable rights.' *Id.* Edward Wyzik had attained such an age.
>
> Rep. Holtzman considered her amendment as an important addition to H.R. 2, noting:
>
> > I believe that many of my colleagues have the impression that under the pending bill, once a worker's benefits have vested, his wife will be provided for in the event that he predeceases her.
> >
> > Such is not the case. Behind the technical language of the bill is a provision which permits pension plans to prevent a widow from receiving survivor's benefits unless her husband dies after he has reached his retirement age. This means that a man who has worked for a company for 15 or 20 years, and whose pension benefits have become fully vested by the time he reaches the age of 45 or 50, had better remain alive for another 20 or 25 years if he wants his wife to receive her share of those vested benefits.
>
> *Id.* at 4724.
>
> Rep. Holtzman went on to criticize the results that would follow if H.R. 2 was not amended:
>
> > This [situation] is unconscionable, particularly because it is not apparent from the language of either

> the bill or the report which is supposed to explain the bill. I am afraid that it will be misleading to employees who will be lulled into a false sense of security in the belief that once their pension rights are vested, their wife will be secure regardless of what happens to them.
>
> The problem here is that even though we have a worker who has fully vested rights in the plan, he has to live to a certain age to insure that his wife will be able to receive any benefits. I think the committee recognized the problem of the surviving spouse in general, but not in this specific instance.

Id.

The amendment immediately encountered opposition. Rep. Erlenborn criticized the proposal:

> . . . because what this does, it converts the pension system into an insurance system that would be double, triple, or quadruple the costs of operating a private pension plan. If we did this by law for those already operating plans, it would double, triple or quadruple their costs. We would probably bankrupt the plan.

Id. He added, however, that "if a company wants to offer an insurance option, that this is fine, which many do; they know what the cost is."
Id.

Rep. Dent echoed these concerns about the cost of implementing the amendment, observing that the objectives sought by the Rep. Holtzman (and the plaintiff here) had only received brief consideration by the Education and Labor Committee:

> The discussion revolved around setting some kind of assurance that there would be payment of survi-

> val benefits. We established a base which set a date for survival before being made available at the earliest retirement age. Anything but that would give such an enormous cost that we could in many cases completely destroy the pension fund, because if one is to be given survivor benefits at any part of his vesting period, which is what the amendment does, there is no way that one can accumulate funds in a retirement pension fund without having a definite number of years to be completed.

Id. at 4725.

Rep. Ullman likewise noted that the cost to plans from Rep. Holtzman's amendment outweighed the benefits:

> These are private and voluntary pension programs. If we impose this kind of requirement, all we are going to do is put a lot of private pension programs out of business. This would cost more than they could afford. What we have tried to do is establish a balance, bring up the minimum pension requirements to the full extent possible without jeopardizing the existence of the private pension program and without discouraging the establishment of additional pension programs. If we impose the kind of high costs involved in this and on the private pension system, we will only discourage the development of further private pension programs and put a lot of existing ones out of business.

Id. After this debate, the amendment was defeated.

Reading §1055(b) together with these passages from the floor debate, it becomes clear that if an employee dies before the later of the two dates specified in §1055(b)(1) or §1055(b)(2), then the plan is excused from any further obligation to provide pension or survivor's benefits. *See generally* Lee, "Joint and Survivor Annuities Under ERISA — The Gamble on Survival", 3 Journal of Cor-

> porate Taxation 241 (1976). Consequently, where Edward Wyzik never became eligible for benefits under §1055(b), his wife could not subsequently become eligible for such benefits.
>
> * * * *
>
> Upon consideration of the controlling statute, and the related legislative history, it appears that defendant's motion to dismiss must be allowed. This conclusion is supported by the language of 29 U.S.C. §1055, and confirmed by Congress' explicit rejection of an amendment that would have directly achieved the result sought here by the plaintiff.
>
> On the facts of this case, denial of pension benefits is regrettable. However, any resolution to this type of problem must await future Congressional action, or improvement of individual pension plans through the bargaining process.

Wyzik, supra, 512 F. Supp. at 1025-1027.

Sometimes, as Judge Meskill remarked in *Singletary v. Secretary of Health, Education and Welfare,* 623 F.2d 217 (2nd Cir. 1980)(dissent), "[t]he temptation to blur the distinction between individual need and statutory eligibility is strong; but our authority as judges often fails to match our sympathy for our fellow human beings." *Id.* at 220. This appears to be just such a case. Despite the valiant efforts of plaintiffs' able counsel to create them, there are no material issues of fact in dispute. The fact that Mr. Bullett died in an industrial accident is not disputed; as a matter of law it is not relevant. The disallowance of benefits to plaintiffs is not the result of any defect, ambiguity, omission or inconsistency in the Plan. (*See* Plan §10.5). To the contrary, the Plan's terms are clear that plaintiffs are not entitled to benefits. The Administration Committee could not, consistent with its fiduciary duty, make an exception to the Plan's requirements. There is no merit to plaintiffs' claim that the decision not to make an exception was arbitrary, capricious or irrational. No exception to the age 55 requirement has ever been made during the Plan's existence. (Palasek Supplemental Affidavit).

For these reasons, and substantially for those set forth in defendant's original and reply memoranda, summary judgment should enter in defendant's favor.

Dated at Bridgeport, Connecticut, this 24th day of November, 1982.

s/ Thomas P. Smith, United States Magistrate

APPENDIX B

Opinion of the United States District Court for the District of Connecticut

James Bullett, et al.
v.
United Technologies Corporation
Represented Employee Retirement Plan
B-82-415

December 17, 1982

Plaintiff has raised what appear to be novel and potentially significant questions of law, including the issue of whether, if an employee's death is brought about by the employer's negligence, the employee's pension beneficiary would be entitled, under ERISA, to the decedant's pension even though the employee died before he was eligible to retire. Such issues raise questions of fact, e.g. whether the death was caused by the defendant's negligence and questions of law inappropriate for summary judgment treatment. For the foregoing reasons, the Magistrate's ruling is overruled. This ruling is not meant to indicate anything regarding the merits of the legal issues raised by the plaintiff.

s/ T.F. Gilroy Daly, Ch USDJ

APPENDIX C

Ruling on Motion for Reconsideration of Ruling,
or Alternatively, for Certification of an
Order for Interlocutory Appeal

James Bullett, et al.
v.
United Technologies Corporation
Represented Employee Retirement Plan
B-82-415

March 14, 1983

The Motion to Reconsider is granted. Upon further review of the Magistrate's Ruling, filed November 24, 1982, and the briefs filed by both sides on the present motion to reconsider, the Court has determined that its prior ruling of December 17, 1982, should be vacated, and the Magistate's [sic] ruling adopted and affirmed in its entirety. So ordered.

s/ T.F. Gilroy Daly, Ch USDJ

APPENDIX D

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JAMES BULLETT, Administrator of the
Estate of Kenneth J. Bullett, et al

V. Civil B-82-415

UNITED TECHNOLOGIES CORPORATION REPRESENTED EMPLOYEE RETIREMENT PLAN,

JUDGMENT

This cause came on for consideration of the defendant's motion for reconsideration of ruling, or alternatively, for certification of an order for interlocutory appeal by the Honorable T.F. Gilroy Daly, Chief, United States District Judge, and

The Court having considered the defendant's motion and all the papers submitted in connection therewith granted the defendant's motion, vacated its ruling of December 17, 1982, and affirmed the Magistrate's Ruling on Motion for Summary Judgment which granted the defendant's motion for summary judgment.

It is therefore ORDERED and ADJUDGED that judgment be and is hereby entered for the defendant.

Dated at Bridgeport, Connecticut, this 6th day of April, 1983.

SYLVESTER A. MARKOWSKI, Clerk

By s/ Kevin F. Rowe
Deputy-in-Charge

APPENDIX E

UNITED STATES COURT OF APPEALS

Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 18th day of October, one thousand nine hundred and eighty-three.

Present:

HONORABLE IRVING R. KAUFMAN,

HONORABLE JON O. NEWMAN,

Circuit Judges,

HONORABLE OSCAR H. DAVIS,

U.S. Court of Appeals, Federal Circuit, sitting by designation.

JAMES BULLETT, Administrator of the Estate of KENNETH J. BULLETT, et al.,
Plaintiffs-Appellants,

— against — 83-7275

UNITED TECHNOLOGIES CORPORATION REPRESENTED EMPLOYEE RETIREMENT PLAN,
Defendant-Appellee.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was submitted.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. Summary judgment was fully warranted in this case. It is undisputed that the pension plan under which appellants seek to recover does not permit a contingent annuitant to receive benefits prior to the covered employee's 55th birthday. This provision is completely consistent with the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1055(b) (1976). The pension plan trustees are required to discharge their duties in accordance with plan terms which comport with ERISA. 29 U.S.C. §1104(a)(1)(D) (1976). The trustees are not authorized to pay benefits not in accord with the terms of the plan or of ERISA. *Pompano v. Michael Schiavone & Sons, Inc.*, 680 F.2d 911, 914 (2d Cir. 1982), *cert. denied*, — U.S. — , 103 S. Ct. 454 (1982). It is undisputed that appellant Phyllis Bullett's husband died prior to his 55th birthday, and under the terms of the plan his survivor may not recover the contingent annuity. *Hernandez v. Southern Nevada Culinary & Bartenders Pension Trust*, 662 F.2d 617 (9th Cir. 1981).

2. Although the circumstances of the appellant Phyllis Bullett's husband's death might be relevant in an action to recover against the employer under applicable workmen's compensation statutes, the issue is not material to eligibility for the contingent annuity. While we are sympathetic to the human tragedy of accidental death on the eve of pension eligibility, we are bound, as was the district court, to enforce the clear and legally authorized terms of the pension plan. Appellants produce no more than unsubstantiated allegations that the age requirement has not been enforced consistently in accordance with Section 10.5(b) of the pension plan. The appellants did not seek discovery on this issue. Accordingly, they have failed to meet their burden of placing this issue in dispute with particularity. Fed. R. Civ. Pro. 56.

3. Appellants' other assertions are equally without merit.

4. Accordingly, the judgment is affirmed.

.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

s/ IRVING R. KAUFMAN,

s/ JON O. NEWMAN,

s/ OSCAR H. DAVIS,
Circuit Judges.